United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

190

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,591

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT L. STROTHERS,

Appellant

Appeal from the United States

District Court for the District of Columbia

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STATEMENT OF THE QUESTION PRESENTED

Did the District Court err in not instructing the jury to disregard certain "evidence" adduced by the prosecutor on cross-examination of the defendant, or in denying defendant's motion for a new trial?

This case has not been before this Court previously under any title.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA,

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ROBERT L. STROTHERS,

Appellant

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The Appellant, Robert L. Strothers, was indicted on one count of unauthorized use of a motor vehicle (22 D.C. 2204) and one count of interstate transportation of a stolen motor vehicle (18 USC 2312). The case was tried before a jury, the Honorable Howard F. Corcoran presiding.

Following a verdict of guilty on count one of the indictment (the unauthorized use count) and a not guilty on the second count (interstate transportation), the Appellant

was sentenced to a term of sixteen to forty-eight months, from which sentence he appeals.

Appellant's Court-appointed Appellate Counsel was also his Court appointed Trial Counsel.

REFERENCES TO RULINGS

None.

STATEMENT OF THE CASE

(a) The Government's Evidence:

Mrs. Martha A. Williams, a resident of the District of Columbia, testified that on January 26, 1970, she attended the Court of General Sessions as a witness (Tr. 11, passim.). On that morning, and for that purpose, she drove her vehicle, a 1969 Pontiac Sedan, to the Sarbov Parking Lot located at 5th and F Streets, N. W., and parked it, receiving a parking check or ticket from the attendant. That afternoon, after having concluded her business with the Court, Mrs. Williams returned to the lot, and in due course discovered that her car had been stolen. On the next day, January 27th, in response to a call from the Metropolitan Police Department, Mrs. Williams sent to Baltimore County, Maryland, and recovered her vehicle. She did not know who had stolen the car.

It was stipulated by the trial Counsel that the attendant at the Sarbov lot would, if called as a witness, testify that Mrs. Williams had parked her car at the lot under his supervision on the day in question, and that on that afternoon the vehicle was taken from the lot by someone whom the witness could not identify (Tr. 34-35).

Officer David McGonnell, a member of the Police Department of Baltimore County, Maryland, testified (Tr. 15, passim.) that on January 26, 1970, and while on his normal tour of duty on that day, he was on patrol northbound on Harford Road [a heavily-traveled artery in Baltimore County], when he observed a 1969 Pontiac sedan parked near a Seven-Eleven Store, beside which vehicle was standing "a colored male subject" [this individual turned out to be a Mr. Larry Bernard Smith, hereinafter referred to]. The Appellant, Mr. Strothers, was seated behind the wheel. The Officer observed Mr. Smith put something into the car and then get into the vehicle on the passenger side. The vehicle then moved off into the roadway. His "suspicions being aroused", Officer McGonnell followed the car for about five minutes and finally overtook and stopped it. The Appellant was driving with Mr. Smith sitting beside him. When, upon interrogation, the Appellant could not produce a driver's license nor the registration of the vehicle, and following a radio check with the National Crime Information Center , and having been advised

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by the Appellant that the car belonged to his cousin (Tr. 77), the Officer placed both subjects under arrest. He did not see the vehicle into the State of Maryland.

It is pertinent to note that, although both suspects were placed under arrest at this time by Officer McGonnell, no charges relative to the stolen car were ever placed by the Maryland or District of Columbia authorities against Mr. Smith; only the Appellant was charged with this. It appears (see the comment of Defense Counsel, Tr. 25) that Mr. Smith was charged in Maryland with an armed robbery; Mr. Strothers was not charged with this.

Mr. Smith, testifying for the Government (Tr. 26, passim.) related that on the day in question he encountered the Appellant at the Greyhound Bus Terminal in Northwest Washington, and that the Appellant inquired if he "wanted to make some money." Mr. Smith agreed. He testified that the Appellant told him that the Appellant would steal an automobile and meet him later; that after obtaining a 1969 Pontiac, Appellant picked him up and the two of them ultimately found their way to Maryland, where the arrest occurred. During all of this time, Mr. Smith testified, the Appellant was driving the vehicle.

This was the gist of the Government's case-in-chief.

(b) The Appellant's Evidence:

The Appellant produced only himself as a witness. Mr. Strothers testified (Tr. 60, passim.) that on January 26, 1970, he encountered Mr. Larry Bernard Smith at the Greyound Bus Terminal. Mr. Smith suggested that they go "sell some slum" ["fake" jewelry] and told the Appellant that he [Mr. Smith] had "a car around the corner".

Mr. Smith then went "around the back" of the terminal and returned with a 1969 Pontiac, telling Appellant that the car belonged to his aunt. After various adventures involving the "jewelry", the two ultimately arrived at the Seven-Eleven store in Baltimore County. When the vehicle left the District of Columbia and entered the State of Maryland, Mr. Smith was driving. When they stopped at the Seven-Eleven, Mr. Smith entered the store and then returned and told Appellant that Appellant could drive, since he (Mr. Smith) was tired. Appellant got behind the wheel, put the vehicle into motion and shortly thereafter the arrest occurred. Appellant had not been behind the wheel prior to the stop at the store in Baltimore County. Appellant denied that he stole the vehicle and denied that on the drive from the District of Columbia to Maryland he had reason to believe that the vehicle had been stolen (in view of Mr. Smith's assertion that the car belonged to his aunt).

At this point in the trial, it is apparent that the jury had before it a simple question of credibility, i.e., whether the Appellant, or the Government's witness-in-chief, Mr. Smith, was telling the truth.

Counsel for the Government then launched into his cross-examination of the Appellant [Tr. 68, passim) with, it is submitted, ultimately disasterous results. He began by interrogating Appellant as to his whereabouts on the day in question, (i.e., the Greyhound station) and as to his initial encounter with Mr. Smith. He led the Appellant back over his testimony to the effect that Mr. Smith had told him that the motor vehicle belonged to Mr. Smith's aunt. Then [Tr. 69]:

"Q. And where did you go after you got in the car first of all? Tell us that.

A. We went to the Mayflower Hotel. He changed clothes. He got a briefcase and he came out and got in the car.

Q. Do you know what was in the briefcase?

A. No, sir, not then at the time when he got it later on.

Q. Later on, did you find out what was in the briefcase?

A. Yes, sir.

Q. What was in the briefcase?

A. A sawed-off shotgun.

Q. A sawed-off shotgun?

A. Yes, sir.

Q. Now --

MR. WHITLOCK:

If Your Honor please, I object to that.

THE COURT:

I will permit it."

Thereafter, Government's Counsel persisted in referring to the sawed-off shotgun, e.g., (Tr. 69-70):

"Q. Now, where did you go after you picked up Mr. Smith's gun?

* * V *

Q. Were you going to use the gun to help to sell the jewelry?

A. No, sir, it wasn't none of my gun.

* * *

Q. Did he [Mr. Smith] take his gun with him [into the Seven-Eleven store]?"

* * *

On re-cross, the subject of the sawed-off shot gun again rose (Tr. 73):

"Q. Mr. Strothers, where was that gun in the car?

A. It was in the briefcase.

Q. Isn't it a fact that the gun was right under the driver's seat when you were driving it?

A. No, sir, it wasn't. He put it there when the police stopped us.

Q. All right, that's your testimony."

Thereafter, a Bench conference ensued. (Tr. 73).

MR. WHITLOCK:

I didn't know that Counsel was going to get into this buisness of the shotgun. I see the police officer is in the Courtroom.

THE COURT:

I wish you [the prosecutor] hadn't gotten into it.

* * *

MR. WHITLOCK:

I think I am now entitled to call the police as my witness [which Defense Counsel ultimately did not] and ask him about the gun, specifically inquiring whether Mr. Larry B. Smith was charged with an offense and what the offense was, namely, armed robbery, and ask him further whether my client was charged with any weapon offense, which he was not.

THE COURT:

You are getting far afield from the unauthorized use of a motor vehicle.

MR. WHITLOCK:

But the jury has gotten this sawed-off shotgun evidence, and it troubles me very much.

* * *

MR. WHITLOCK

May I object on the grounds the testimony about the sawed-off shotgun is -- it's an absolutely murderous weapon -- is prejudicial to the Defendant, since it is not otherwise connected to the case, and I would ask Your Honor to instruct the jury to disregard it.

THE COURT:

It is admissible, but I would rather it would not have been brought into the case. It's introducing an extraneous issue into the case. I don't like it.

* * *

MR. WHITLOCK:

I am a little concerned about the shotgun. A sawed-off shotgun is a murderous thing.

THE COURT:

What can I do to correct it?

MR. WHITLOCK:

I don't know, Judge.

THE COURT:

This is the way it happened. I don't think there is anything more we can do, so I will leave it.

MR. WHITLOCK:

Do you suppose, Your Honor, to protect the record, I should move formally that Your Honor instruct the jury to disregard that business about the shotgun?

THE COURT:

No, I won't do that.

SUMMARY OF ARGUMENT

The verdict in this case is inconsistent. While this in itself would probably not be objectionable, the inconsistency at bar was very probably occasioned by the improper and prejudicial reference made by the prosecutor to an apparent "crime" with which, in fact, the Appellant had never been charged.

ARGUMENT

The jury in this case acquitted the Appellant of the crime of interstate transportation of a stolen motor vehicle, and convicted him of the crime of unauthorized use of a motor vehicle.

This result is inconsistent. If the Appellant "took" the motor vehicle, and then "used or caused to be used" within the District of Columbia, within the purview of the statute, and was thereafter found in the vehicle in another jurisdiction, then manifestly the Appellant must have had knowledge that the vehicle "had been theretofore stolen" when he went with it across the State line.

It is clear that the mere fact of inconsistency in a verdict is not ordinarily grounds for upsetting a verdict,

as long as there is evidence to support the verdict of guilt. Leading on this is Dunn v. United States, 284 U.S. 390, 393-394 (1932).

Travers v. United States, 118 U.S. App. D.C. 276 (1964), does not appear to be in point. There, Appellant was acquitted of unauthorized use in the District, but convicted of interstate transportation of a stolen motor vehicle from the District of Maryland. The District Court in that case had been requested to instruct the jury that if, on the basis of the appropriate inferences (there being no direct evidence as to the theft), it acquitted under the unauthorized use count, it would be obliged to acquit under the interstate transportation count. The trial court declined to give this instruction, which was held to be error.

In Travers, this Court, citing Dunn, supra, used the expression "mere inconsistency". Appellant contends that, absent the specific objection which he raises relative to the interjection of the evidence relative to possession of the sawed-off shotgun, the result here might be said to be a "mere inconsistency" inasmuch as, absent that, it would appear that this present case would simply represent an instance where, upon conflicting testimony, the jury accepted part of the Defendant's story and rejected the balance, or, in other words, that the verdict worked a "mere inconsistency", tolerable under Dunn.

However, it is the specific contention of the Appellant that the reference by the prosecutor to the fact that a sawed-off shot gun had been recovered from the stolen vehicle, notwithstanding the fact that Appellant had never been charged in any jurisdiction with an offense involving a weapon, which fact must (perforce) have been known to the prosecution, could only have served to create in the minds of the jury a frightfully unfavorable image of the Appellant .

It is obvious, from a reading of the entire transcript, that essentially, the trialinvolved a credibility contest involving the Defendant versus the Government's witness, Mr. Smith.

It is fair to suggest that the jury must have felt that some part of the Government's case was unimpressive; otherwise it would have had little difficulty in convicting the Appellant across-the-board. Otherwise, on two charges which are manifestly so interstitially related it is puzzling to see how the conviction on the unauthorized use count could be rationalized.

It is entirely too probable that the inconsistency of the verdict was engendered by the explosive interjection by the prosecution of the reference to the sawed-off shot gun.

This Court does not have to be reminded that, in the entirety of the sad catalogue of weaponry, the sawed-off shotgun is with little doubt the most spectacularly unpleasant implement customarily available to those of lawless bent. In effect, we have a situation where, in the course of what would otherwise have been a rather ordinary, uneventful trial involving allegations of car theft, a question suggesting apparent or possible involvement with an utterly murderous weapon was suddenly - and illogically, irrelevantly and immaterially · injected into the proceedings.

The wonder is that the jury did not also convict the Appellant of interstate transportation.

Appellant's Counsel has researched the precise point with which we are here presented, viz. (improper) reference to other criminal conduct apparently engaged in by the Defendant. Put otherwise, the question seems to be as to the effect of a reference to some (other) form of alleged criminal conduct on the part of the defendant, short, of course, of permissable reference to, and proof of, a prior conviction.

It should be borne in mind that there was, at bar, no problem arising under Luck v. United States, 121 U.S. App. D.C. 151 (1965). Thus, the numerous decisions involving the Luck situation are not pertinent here.

While very little specific authority has been found on the problem here presented, there are several decisions in this Circuit which are helpful.

Eagles v. United States, 58 U.S. App. D.C. 122 (1928) was a prosecution for the murder of a police officer. At trial, evidence was introduced to show that the murder weapon had been obtained by the defendants in two separate robberies committed by them in Virginia several weeks before the killing. The Court of Appeals held that this testimony was competent "to identify the accused as the owners of the pistols at the time of the homicide."

It is quite pertinent to note, however, that this Court, speaking through Chief Justice Martin, was at pains to point out (58 U. S. App. D.C. 124) that:

> "The Court carefully instructed the jury that [such] testimony was admissible for that purpose only [viz, to connect the weapon with the defendant], and that the fact, if such appeared, that a separate prior crime was involved in the procurement of the pistols by the accused 'has got absolutely nothing whatever to do with the question of whether they are guilty of this crime that is charged against them here.'"

Moreover, this Court continued (ibid):

> "Appellant's charge that the testimony relating to the prior crimes went into unnecessary details, and thereby tended to inflame the prejudice of the jury against them. We think the record does not sustain

> this charge. Moreover, 'where the question relates to the tendency of certain testimony to throw light on a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge, which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.' (Emphasis supplied).

Sykes v. United States, 79 U.S. App. D.C. 97, 143 F.2d 140 (1944), was an appeal from a conviction of robbery. At trial, a witness for the Appellant was asked on cross examination when he had first known Appellant. He replied, "Two years ago at Lorton."

Counsel contended that this was error, inasmuch as the jury could not escape knowing that Appellant was an ex-convict. This Court disagreed, remarking:

> "The question asked of Appellant's witness was when and not where he had first met Appellant, and his answer that he had met him in the federal prison was entirely voluntary, and, under the circumstances, the most that Appellant had the right to ask was that the jury should be told that they should not consider the statement in relation to his guilt or innocence in the trial then in progress; but counsel for appellant made no such request."

At bar, counsel for the appellant made such a request. See Tr., pp. 79-80.

Barnes v. United States, 124 U.S. App. D.C. 318, 365 F.2d 509 (1966) was a prosecution for housebreaking

and other crimes, in which the defendant did not testify. The point is best explained in the initial per curiam Opinion of the Court (later supplemented):

> "Defendant did not testify, and the case did not present an occasion for introducing evidence of defendant's criminal record. Nevertheless, the prosecutor of defendant obviously was permitted to introduce in evidence a 'rogues gallery' or 'mug shot' photograph of defendant, conveying to the jury the information that defendant had a police record. This prejudice was not dissipated by some taping placed over some words or figures at the bottom of the photograph. Because the admission of this evidence was prejudicial area, we reverse and remand the case for a new trial."

Later, speaking for himself (and Judge Fahy, with Judge Prettyman defending), Judge Leventhal said that:

> "The probability that [the mug shot] impressed upon the jury the fact of appellant's prior record is too substantial for us to ignore. We find prejudicial error requiring a new trial."

Wharton on Criminal Evidence (1955 ed., vol. 1, p. 492 et seq.) points out that the rule is applicable where the evidence is elicited from a witness by the prosecution or from the defendant himself (citing Weiner v. United States, 20 F.2d 527, 3rd Cir. (1927), and that:

> "When the proof of the commission of another crime is not proper, it is likewise improper for the prosecutor to state or insinuate that such crime has been committed. *** A conviction may be set aside for violation of this rule."

On this point, Wharton cites Hall v. United States, 150 U.S. 76, 37 L. ed. 1003 (1893). This involved an ad hominem argument to the jury by the prosecutor, the net effect of which was succinctly disposed of by Mr. Justice Gray, who, speaking for an unanimous court, said (150 U.S. 81):

> "The attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court, and the jury directed to allow it no weight."

Pertinent on the question of the gratuitous insinuation of the commission of other crimes is State v. Norris, 168 So. 2d 541 (1960). There, the Supreme Court of Florida had before it an appellant who had been convicted of first degree murder via the administration of arsenic oxide to a certain individual. The trial judge permitted testimony "regarding the arsenic content found in the exhumed bodies of certain other individuals." The defendant had objected to the admission of this evidence, on ground "that there was no showing that she had anything whatever to do with feeding arsenic to the other decedents." An intermediate appellate court reversed, and on certiorari, the Supreme Court of Florida affirmed this action.

In doing so, the Court said that:

> "In order for the questioned evidence to reach a degree of admissible relevancy, it would be necessary to infer that lethal potions of arsenic had been administered to [the other people]. From that, we would have to infer that [Appellant] committed [this] action."

In State v. Hines, 133 No. 2d 371 (1964), the Supreme Court of Minnesota said that:

> "Questions intended to force admissions relating to a collateral crime committed may violate the privilege against self-incrimination, but, more comprehensively, are usually irrelevant and prejudicial. *** We adhere to the prevailing rule that an accused does not, by testifying, put in issue his general character or propensities: and although his credibility may otherwise be assailed, it cannot be done by introduction of evidence of collateral crimes. Involvement in disconnected criminal conduct thus is regarded as inadmissible as a matter of policy because it creates a probability of guilt irrespective of guilt of the crime charged. Where, however, the evidence of other criminal conduct is relevant to an issue being tried and is not merely to show a general disposition to crime or meretricious conduct, it is admissible."

CONCLUSION

The attempt by the prosecutor in this case to suggest to the jury, by a process of insinuation, that the appellant had been involved in other criminal misconduct was grossly inflamatory, prejudicial, and improper, and should

have been appropriately dealt with by the lower court. The case should be sent back for a new trial on the charge of unaurhorized use, with appropriate directions.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the within brief for Appellant was personally delivered by me on this _____ day of January 1971 to the Office of the United States Attorney, United States Courthouse, Washington, D. C.

RICHARD WHITTINGTON WHITLOCK
Attorney for the Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,591

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT L. STROTHERS, APPELLANT

Appeal from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
HERBERT B. HOFFMAN,
PAUL L. FRIEDMAN,
Assistant United States Attorneys.

Cr. No. 578-70

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

III

ISSUE PRESENTED *

In the opinion of appellee the following issue is presented:

Whether, in light of all the evidence and the court's instructions on the law, it was an abuse of discretion for the trial judge to permit some inquiry by the prosecutor about a gun found in the car which appellant was driving at the time of his arrest?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,591

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT L. STROTHERS, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed on April 6, 1970, appellant was charged with one count of unauthorized use of a motor vehicle [1] and one count of interstate transportation of a stolen motor vehicle.[2] A one-day jury trial took place before the Honorable Howard F. Corcoran on June 8, 1970. The jury returned a verdict of guilty of unauthorized use and not guilty of interstate transportation. Appel-

[1] 22 D.C. Code § 2204.

[2] 18 U.S.C. § 2312.

lant's trial counsel, who is also counsel on appeal, filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial, which was denied on June 30. Appellant was sentenced on July 31, 1970, to serve a term of sixteen to forty-eight months. This appeal followed.

The Government's Case

On January 26, 1970, at about 8:30 a.m., Mrs. Martha A. Williams drove her green two-door 1969 Pontiac Tempest to the Court of General Sessions, where she was to appear as a witness. She parked her car, bearing District of Columbia tags with the number 741-842, at the Sarbov parking lot on the corner of Fifth and F Streets, Northwest, leaving her keys in the automobile at the attendant's request. Upon returning to the parking lot at approximately 2:30 the same afternoon, Mrs. Williams found her automobile missing. She immediately reported it stolen (Tr. 9-13). Mr. Herbert J. Molina was working as an attendant at the same Sarbov parking lot on January 26, 1970 and he received a motor vehicle from Mrs. Williams that morning; she left her keys in the car. Mr. Molina recalled that at about 2:00 o'clock in the afternoon the car was removed from the parking lot by someone other than Mrs. Williams (Tr. 52). Mrs. Williams next saw her automobile on the following day, January 27, when she recovered it from the Baltimore County authorities. She testified that she had never seen appellant before the day of trial and had not given him permission on January 26, or at any other time, to use her automobile (Tr. 14).

Mr. Larry Smith, an acquaintance of appellant, saw appellant on January 26 at the Greyhound Bus Station.[3]

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[3] Aware of the potential for self-incrimination inherent in Mr. Smith's testifying, the prosecutor asked the court to conduct a hearing outside the presence of the jury in order to insure that Mr. Smith "is coming here freely and voluntarily to testify concerning the facts in this case, and to advise him of his rights against self-incrimination" (Tr. 24). The court held such a hearing, at which

Appellant suggested to Mr. Smith that the two of them "go and make some money" (Tr. 38). Smith protested that he had no automobile, but appellant said that he "would steal an automobile" and meet Smith two hours later, at 2:00 o'clock, at the Hi-Boy Restaurant at Seventh and D Streets, Northwest (Tr. 38). Mr. Smith arrived at the appointed time and place, as did appellant, who blew his horn in a green '69 Pontiac and he picked me [Smith] up and rode me down to F Street and as we went out on F Street, we went by this parking lot and he showed me this place that he had taken this car from" (Tr. 38). With appellant driving, the two men then went to 1420 N Street, where Smith "went upstairs and I [Smith] got a pistol from upstairs and when I left from upstairs with this pistol, we went out to Eastover Shopping Center on South Capitol Street" and then to Baltimore County (Tr. 38-39).[4] Appellant and Mr. Smith "parked at the Seven Eleven because he [appellant] had said something about that we were going to stick up - - -" (Tr. 39).[5] When the police arrived at the Seven-Eleven, appellant "pulled off and went onto the Parkway," where they were stopped and arrested by Officer David McGonnell of the Baltimore County Police (Tr. 40). Mr. Smith testified that from 2:00 o'clock in the afternoon, when appellant first picked him up in the green Pontiac, until they were stopped by the police officer in Maryland, it

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Mr. Smith was advised of his rights and was questioned by the prosecutor, defense counsel and the judge to assure that he fully understood his rights (Tr. 24-33). Further, Mr. Smith was provided with an attorney from the Legal Aid Agency who conferred with him at length and then reported to the court that Smith fully understood what his rights were (Tr. 34). The court then inquired of Mr. Smith himself, who indicated that he wished to testify (Tr. 34). The jury returned to the courtroom, and the trial continued.

[4] Defense counsel, who is also counsel on appeal, did not object to this question or answer at trial.

[5] The prosecutor interrupted Mr. Smith's answer at this point, apparently not because the testimony lacked relevance but because it might have been hearsay. Defense counsel offered no objection.

was appellant who drove at all times. In fact, Smith said that he did not know how to drive (Tr. 40). The extensive cross-examination of Mr. Smith was devoted almost exclusively to showing his bias toward appellant.[6]

At about 6:16 p.m. on January 26, 1970, Officer David Francis McGonnell of the Baltimore County Police observed a dark green 1969 Pontiac parked near a Seven-Eleven store at Fifth Avenue and Harford Road in Baltimore County, Maryland (Tr. 16-17). He saw Larry Smith preparing to get into the car and appellant sitting "behind the wheel of the '69 Pontiac" (Tr. 18). Mr. Smith placed something in the car and got into the vehicle on the passenger side. When the car started up, Officer McGonnell followed, observed the automobile for about five minutes and then stopped it on the Beltway. During this entire period of time appellant was driving. The officer asked appellant for his license and registration, but appellant said "that he left his wallet in D.C. and didn't have any identification on him" (Tr. 20). The officer then called the National Crime Information Center "to get a check . . . on the tag of the vehicle" (Tr. 20). As a result of the information which he received, Officer McGonnell arrested both appellant and Mr. Smith.

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[6] Because defense counsel had failed to have a third person at the pre-trial witness interview which he held with Mr. Smith, he was unable to introduce extrinsic evidence of bias without taking the witness stand himself. After a careful analysis of *United States* v. *Vereen*, 139 U.S. App. D.C. 34, 429 F.2d 713 (1970), and *United States* v. *Porter*, 139 U.S. App. D.C. 19, 429 F.2d 203 (1970), the trial judge ruled that counsel could not become a witness on the collateral matter of bias. However, to alleviate the problem, the judge helped defense counsel to formulate questions which would elicit the testimony he sought, and the judge allowed counsel wide latitude in seeking to impeach Mr. Smith by showing his personal animosity toward appellant. While Smith denied any such bias, it was obvious to the jury, as the judge noted, that defense counsel in fact had a conversation with Mr. Smith and "that he told you these things in the conversation that you had with him. You are going to get the benefit of that testimony." (Tr. 58.) Defense counsel was also permitted to question appellant about the purported grudge which Mr. Smith had against him (Tr. 64-66).

The Defense

Appellant was the only witness for the defense. He testified that he was at the Greyhound Bus Terminal on January 26, 1970, when Larry Smith approached him and suggested that they go sell some fake jewelry. Appellant claimed that Smith had a 1969 Pontiac "around the back of the Grey Hound Bus Terminal" at that time and that Smith said the vehicle belonged to his aunt (Tr. 61). The two entered the vehicle, and, according to appellant, Smith drove the car all the time they were in the District of Columbia and from the District into Maryland. However, once they reached the Seven-Eleven Store in Baltimore County, "he [Smith] goes in the store and comes back out. Then he tells me he's tired, I can drive. So when I gets on the steering wheel, the police pulls in the Seven Eleven lot." (Tr. 62.) A few moments later appellant and Mr. Smith were stopped by Officer McGonnell. The remainder of appellant's testimony on direct examination concerned the alleged "grudge" which Smith had against appellant. Specifically, appellant mentioned a conversation which he had with Smith in the District of Columbia Jail in which appellant purportedly told Smith that he was not guilty of the crimes with which he was charged in this case (Tr. 65-66).[7]

On cross-examination, appellant denied that he and Smith talked about getting some money and reiterated that Smith told him that the car belonged to his aunt (Tr. 68-69). Then ensued the testimony which is the focal point of this appeal:

> Q. And where did you go after you got in the car first of all? Tell us that.
>
> A. We went to the Mayflower Hotel. He [Smith]

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[7] There was also some testimony by appellant that Mr. Smith was in jail on an unrelated charge of carrying a dangerous weapon. However, with the agreement of the prosecutor and defense counsel, the court instructed the jury to disregard testimony concerning the reason for Mr. Smith's incarceration (Tr. 67-68).

changed clothes. He got a briefcase and he came out and got in the car.

Q. Do you know what was in that briefcase?

A. No, sir, not then at the time when he got it; later on.

Q. Later on, did you find out what was in that briefcase?

A. Yes, sir.

Q. What was in the briefcase?

A. A sawed-off shotgun.

Q. A sawed-off shotgun?

A. Yes, Sir.

Q. Now—

MR. WHITLOCK [defense counsel]: If Your Honor please, I object to that.

THE COURT: I will permit it.

Q. Now where did you go after you picked up Mr. Smith's gun?

A. We left from the Mayflower Hotel and went to the State of Maryland.

Q. You went to sell jewelry, is that is?

A. Yes, sir.

Q. Were you going to use the gun to help to sell the jewelry?

A. No, sir. It wasn't none of my gun.

Q. What?

A. It wasn't none of my gun.

Q. I see. And when did you get to Maryland?

A. It was in the evening. I don't know exactly what time it was.

Q. How about at the Seven Eleven store, were you going to sell some jewelry there?

A. No, he went in the Seven Eleven store and I stayed on the street.

Q. Did he take his gun with him?

A. No, sir. (Tr. 69-70.)

Appellant testified further that he had no driver's license in his possession on January 26, 1970, but that he failed to advise Mr. Smith of this fact and that, when stopped by the police officer, he did not tell the officer that the car belonged to Mr. Smith's aunt. Instead, appellant told

Officer McGonnell that the automobile was owned by his cousin because "he [Smith] told me to tell him it was my cousin's car" (Tr. 72). Officer McGonnell also testified that appellant had told him that the car belonged to his cousin (Tr. 77).

On redirect examination of appellant, his counsel inquired further about the shotgun:

> Q. Mr. Strothers, this gun that you referred to, was that your weapon?
> A. No, sir.
> Q. Did you have anything to do with that at all?
> A. No, sir. I don't own no gun.
> MR. WHITLOCK: No further questions, Your Honor. (Tr. 72.)

The prosecutor then asked whether the gun was under the driver's seat when appellant was driving. Appellant responded that it was not and added that Smith "put it there when the police stopped us" (Tr. 73).

Then followed a bench conference at which the prosecutor indicated that his purpose in asking appellant about the shotgun was to show motive or intention (Tr. 73). Specifically, he said that while appellant denied stealing the car, Mr. Smith testified that they were planning to use the vehicle in a robbery and that the gun was relevant to that purpose. The court, over objection, ruled that the testimony was admissible (Tr. 75, 79-80). Closing argument[8] and the court's instructions followed. At the conclusion of the deliberations, which were interrupted so that the court could clarify two matters for the jury in response to its questions, the jury returned its verdict of guilty of unauthorized use of a vehicle and not guilty of interstate transportation of a stolen motor vehicle.

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[8] Neither the prosecutor nor defense counsel mentioned the shotgun in his argument to the jury.

ARGUMENT

The trial judge did not abuse his discretion when he permitted the prosecutor to inquire about a shotgun found in the car which appellant was driving when arrested.

(Tr. 38-40, 68-75, 79-80)

A ruling on the relevancy of evidence "depends upon the sound discretion of the trial judge and will not be disturbed upon appeal except for grave abuse." *Hardy* v. *United States*, 118 U.S. App. D.C. 253, 254, 335 F.2d 288, 289 (1964).[9] In this case Larry Smith testified that he and appellant were going to "go and make some money" (Tr. 38) and that appellant stole a car in order to effectuate that purpose. He further testified, without objection, that they made a stop and that he (Smith) "went upstairs and I got a pistol from upstairs and . . . I left from upstairs with this pistol" (Tr. 38). At another point, again without objection from defense counsel, Mr. Smith began to say that appellant had told him that they were going to commit a stickup (Tr. 39). Thus the Government's case was built, in part, on showing a design or purpose on the part of appellant to steal a car, get a gun and commit a robbery. Testimony about the proposed stickup and Mr. Smith's gun was therefore relevant to prove the charges relating to the taking of the automobile for which appellant was on trial.

Despite its clear relevance, the prosecutor was nevertheless careful not to emphasize this testimony unduly in his case in chief in order to avoid possible prejudice to appellant. However, when appellant took the witness stand and contradicted the Government's witnesses by stating, among other things, that he and Smith were going to sell fake jewelry, not to commit a robbery (Tr. 61-

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[9] *See also Harper* v. *United States*, 99 U.S. App. D.C. 324, 239 F.2d 945 (1956); *Bracey* v. *United States*, 79 U.S. App. D.C. 23, 142 F.2d 85, *cert. denied*, 322 U.S. 762 (1944); *Eagles* v. *United States*, 58 App. D.C. 122, 25 F.2d 546, *cert. denied*, 277 U.S. 609 (1928).

62), the prosecutor on cross-examination properly sought to refute appellant's version of the events and to rehabilitate the Government's own witness. Eliciting testimony about the shotgun served this purpose, and it was within the trial judge's discretion to permit such inquiry.[10] His decision to admit evidence about the shotgun reflected his view that the testimony was relevant on the issue of common scheme, plan or design and that its probative value on this issue outweighed the possibility of prejudice. *See United States* v. *Marcey*, D.C. Cir. No. 22,819, decided February 24, 1971, slip op. at 3-4.[11]

Evidence of criminal conduct for which a defendant is not then on trial is not admissible merely to show the defendant's disposition to commit crime. *Drew* v. *United States*, 118 U.S. App. D.C. 11, 15, 331 F.2d 85, 89 (1964). But when the evidence is relevant to any of the issues properly before the jury, its prejudicial effect may be outweighed by its probative value, and it may therefore be admitted. *Id.* at 16, 331 F.2d at 90. Among such issues are motive, intent, absence of mistake or accident, identity, and common scheme or plan embracing the com-

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[10] The scope of the prosecutor's cross-examination in this case is much more limited than that approved by this Court in *United States* v. *Pugh*, —— U.S. App. D.C. ——, 436 F.2d 222 (1970), wherein the court said that cross-examination should not be limited merely because "it was prejudicial to the character of the witness and to his credibility," so long as it related to matters brought out on direct examination. *Pugh, supra*, —— U.S. App. D.C. at ——, 436 F.2d at 224. The court even authorized questions on cross-examination which "had no foundation in fact," so long as the questions were "not an improbable flight of fancy." *Id.* at ——, 436 F.2d at 225.

[11] This case differs significantly from *United States* v. *McClain*, D.C. Cir. No. 22,652, decided January 27, 1971, where it was held to be error in a second-degree murder prosecution to allow testimony that seven months before the homicide the defendant had struck the decedent with a chair. While such testimony might be too remote in time for its probative value to outweigh potential prejudice, the questioned testimony in this case relates to a highly relevant matter, the presence of a shotgun in the car being driven by appellant, which occurred simultaneously with the events for which appellant was on trial.

mission of two or more criminal acts so interrelated that proof of one tends naturally to establish the others. *Id.* Evidence of other crimes is also admissible when it helps to explain the circumstances of the offense charged or tends to prove any element of that offense. *Fairbanks* v. *United States*, 96 U.S. App. D.C. 345, 347, 226 F.2d 251, 253 (1955). *See also Cantrell* v. *United States*, 116 U.S. App. D.C. 311, 323 F.2d 613 (1963), *cert. denied*, 379 U.S. 950 (1964). Specifically, when "the two crimes arose out of a continuing transaction or the same set of events, the evidence would be independently admissible in separate trials." *Drew*, *supra*, 118 U.S. App. D.C. at 16, 331 F.2d at 90. If testimony is thus relevant, then the mere fact "that it may tend to prove the commission of another offense does not make it inadmissible. And neither does the fact that, incidentally, it may injuriously affect the character of the accused with the jury." *Bracey* v. *United States*, *supra* note 9, 79 U.S. App. D.C. at 27-28, 142 F.2d at 89-90.[12]

It is not clear that the presence of a shotgun in the car which appellant was driving at the time of his arrest made appellant guilty of a crime in addition to the one for which he was on trial. There is nothing in the record about the gun laws of Maryland. Defense counsel represented to the trial court that appellant had not been charged with a weapons offense (Tr. 74), and the fact that the gun belonged to Mr. Smith may well have proved exculpatory in any trial in which appellant was charged with possession of the shotgun. Thus the judge's ruling on the admissibility of testimony about the shotgun, and any possible prejudice flowing therefrom, is not necessarily governed by the rules regarding admissibility of evidence of other crimes. *Cf. Leonard* v. *United States*, 265 A.2d 776 (D.C. Ct. App. 1970).

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[12] As already noted, if evidence about the shotgun was at all prejudicial, it did not "injuriously affect the character of the accused with the jury." Since the testimony was clear that the shotgun was owned by Mr. Smith, it was only *his* character that could be impugned by its mention.

Assuming *arguendo*, however, that those rules control the situation presented by this case, the evidence was nevertheless properly admitted. The fact that the shotgun was found in the car helped to show a common scheme or plan to use both the gun and the automobile in an armed robbery. It tended to "explain the circumstance of the offense charged" and helped "logically to prove" that appellant committed that offense. *Fairbanks* v. *United States*, *supra*, 96 U.S. App. D.C. at 347, 226 F.2d at 253. It was evidence which showed that appellant and his passenger had the necessary physical means to commit an armed robbery, which was "some evidence of the possibility or probability" that appellant also took the 1969 Pontiac in order to carry out this purpose. *Morton* v. *United States*, 87 U.S. App. D.C. 135, 136, 183 F.2d 844, 845 (1950); *see Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961). Moreover, since the testimony about the shotgun was developed primarily on cross-examination of appellant, who had denied he took the car and had told a story not consistent with the facts related by the Government's witnesses, it was all the more proper for the prosecutor to inquire about the gun. *United States* v. *Marcey*, *supra*, slip op. at 3-4; *United States* v. *McCray*, —— U.S. App. D.C. ——, 433 F.2d 1173 (1970). "Evidence which incidentally reveals the commission of another crime other than the one named in the indictment may, nevertheless, be received if it tends to defeat the defensive theory or rebut an issue raised by the defense." *Bracey* v. *United States*, *supra* note 9, 79 U.S. App. D.C. at 28, 142 F.2d at 90.[13]

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[13] Among other pertinent cases in which the admissibility of evidence of other crimes was upheld are the following: *United States* v. *Gay*, 133 U.S. App. D.C. 337, 410 F.2d 1036 (1969); *Cantrell* v. *United States*, *supra*; *Harper* v. *United States*, *supra* note 9; *Bell* v. *United States*, 93 U.S. App. D.C. 173, 210 F.2d 711, *cert. denied*, 347 U.S. 956 (1954); *Hall* v. *United States*, 83 U.S. App. D.C. 166, 168 F.2d 161, *cert. denied*, 334 U.S. 853 (1948); *Tomlinson* v. *United States*, 68 App. D.C. 106, 93 F.2d 652, *cert. denied*, 303 U.S. 642 (1938); *Eagles* v. *United States*, *supra* note 9; *McHenry* v. *United*

Appellant relies heavily on *Hall* v. *United States*, 150 U.S. 76 (1893). The Supreme Court's holding in that case, however, rested not on the rules governing the admissibility of evidence of other crimes, but on the prosecutor's unethical behavior and on an improper application by the trial court of the rules of judicial notice and on the constitutional imperative that the Government must prove guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970); *cf. Lee* v. *United States*, 125 U.S. App. D.C. 126, 368 F.2d 834 (1966). A more relevant case, though not cited by appellant, is *Moore* v. *United States*, 150 U.S. 57 (1893), a unanimous opinion decided the same day as *Hall*. In *Moore* the Supreme Court upheld the trial judge's admission of testimony that the defendant may have committed a murder in addition to the one for which he was on trial "to show, not that Camp had been killed by defendant, but as a motive for his alleged murder of Palmer." 150 U.S. at 59.

> Where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court . . . . 150 U.S. at 60.

Cf. United States v. *Thurman*, D.C. Cir. No. 22,466, decided October 28, 1970, slip op. at 10-11.

States, 51 App. D.C. 119, 276 F. 761 (1921). The following Dyer Act cases from other circuits are also in point: *Gregory* v. *United States*, 365 F.2d 203 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967); *Morgan* v. *United States*, 355 F.2d 43 (10th Cir.) *cert. denied*, 384 U.S. 1025 (1966); *Tandberg-Hanssen* v. *United States*, 284 F.2d 331 (10th Cir. 1960).

Appellant posits the subsidiary argument that reference to the shotgun influenced the jury to return inconsistent verdicts, a position different from that which he took in the trial court where he was represented by the same counsel. See Sent. Tr. 1. In any event, the jury's verdicts of guilty of unauthorized use of a motor vehicle and not guilty of interstate transportation of the same vehicle are not legally inconsistent. "The offenses are separate and distinct, even though the same vehicle is the subject of both acts. The offenses involve different elements and require different proof." *United States* v. *Oates*, 314 F.2d 593 (4th Cir. 1963). Violation of the unauthorized use statute "involves only a 'general criminal intent,' which may be presumed from doing the prohibited acts," *Proctor* v. *United States*, 85 U.S. App. D.C. 341, 342, 177 F.2d 656, 657 (1949), while a Dyer Act violation requires the specific intent to deprive the owner, permanently or temporarily, of the rights and benefits of ownership. *United States* v. *Turley*, 352 U.S. 407 (1957). Thus, in affirming a conviction for unauthorized use of a vehicle while finding insufficient evidence to support a conviction for interstate transportation of the same vehicle, this Court has said, "Obviously more proof is necessary for the Dyer Act charge, dependent on an intent that requires a stealing, than for an unauthorized use charge." *Kee* v. *United States*, 135 U.S. App. D.C. 249, 250, 418 F.2d 465, 466 (1969). Surely the jury in this case, having heard the evidence and having been properly instructed as to the law, was entitled to reach a similar conclusion.

Appellant correctly notes that *Travers* v. *United States*, 118 U.S. App. D.C. 276, 335 F.2d 698 (1964), is not in point. There the court found inconsistent the jury's verdict of guilty on the charge of interstate transportation of a vehicle from the District of Columbia to Maryland and not guilty of unauthorized use of the vehicle in the District:

> Travers could not possibly be found guilty of transporting the Spell car from the District of Columbia

> into Maryland as charged in the indictment if he did not operate the car in the District. Interstate transportation did not occur if there was no transportation by him in the District, and the jury verdict of not guilty on count one necessarily rejected the only evidence that would have supported a guilty verdict under count two. 118 U.S. App. D.C. at 280, 335 F.2d at 702.

Cf. Bray v. *United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962). However, the converse of the *Travers* proposition is not true: a jury verdict of not guilty of interstate transportation of a stolen motor vehicle does not clearly reject the only evidence in support of a guilty verdict on the unauthorized use charge, for less is required to prove the latter than the former. Thus legally it is perfectly consistent for the jury on the instant record to have found appellant guilty of unauthorized use of a vehicle in the District of Columbia and not guilty of interstate transportation of a vehicle from the District into Maryland. So far as this Court's view of the facts is concerned, "however much the jury's conclusion may tax the legally trained's penchant for compatibility," so long as that conclusion is legally permissible and rests on "an ample evidentiary base for conviction," the jury verdicts must stand. *United States* v. *Fox*, —— U.S. App. D.C. ——, ——, 433 F.2d 1235, 1238 (1970). If legally permissible, the verdicts need not be logically consistent.[14]

Appellee disagrees with appellant's contention that the trial in this case was nothing more than a credibility contest between appellant and Larry Smith. With the exception of venue, all the elements of the offense of un-

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[14] In *Fox* the jury found the defendant not guilty of larceny but guilty of burglary which necessarily required proof of entry with the specific intent to commit a crimnal offense. Yet the court affirmed the burglary conviction, finding "consistency within individual counts and an ample evidentiary base for conviction." —— U.S. App. D.C. at —— n.21, 433 F.2d at 1238 n.21. Indeed, the Court in *Fox* recognized the inherent right of juries to "convict on some counts but acquit on others, not because they are unconvinced of guilt, but simply because of compassion or compromise." *Id.* at —— n.22, 433 F.2d at 1238 n.22, and cases there cited.

authorized use of a motor vehicle were proved by testimony of witnesses other than Mr. Smith. His was, of course, the only direct testimony that appellant was driving the car within the District of Columbia. However, even had Smith not testified, the jury could have inferred from appellant's possession of the recently stolen vehicle in Maryland that appellant was guilty of unauthorized use of the vehicle in the District. *See United States* v. *Johnson*, —— U.S. App. D.C. ——, 433 F.2d 1160 (1970); *United States* v. *Coggins*, —— U.S. App. D.C. ——, 433 F.2d 1357 (1970); *cf. United States* v. *Horton*, D.C. Cir. No. 23,641, decided March 12, 1971. The Government's case being strong, the jury's verdict did not turn on whether they found appellant or Mr. Smith the more credible witness.

To the extent that credibility was at issue in this case, appellant was benefited, not prejudiced, by what occurred at trial. First, the testimony of both appellant and Mr. Smith was that Smith was the owner of the sawed-off shotgun, a weapon which defense counsel himself characterized as "an absolutely murderous weapon" (Tr. 75). Second, defense counsel very effectively showed Smith's animosity toward appellant. As the trial judge noted, it was "pretty obvious to the jury" that defense counsel had a conversation with Mr. Smith in which he told counsel that he had a grudge against Mr. Strothers (Tr. 58) and that he "intended physical violence against Mr. Strothers" (Tr. 50-51). Third, defense counsel was permitted to argue to the jury Mr. Smith's bias toward appellant (Tr. 90-93). Fourth, the trial judge instructed the jury to consider whether any witness "has demonstrated friendship or animosity toward other persons concerned in this case" (Tr. 100), whether "any witness has shown himself to be biased or prejudiced" (Tr. 101), and whether "any witness has wilfully testified falsely" (Tr. 101)—instructions which were particularly damaging to the Government in light of the testimony about the shotgun and Mr. Smith's responses to the questions on bias. Finally, the trial judge gave an in-

struction separate from his other instructions, and thus probably highlighted in the jurors' minds, on accomplice testimony, which he said "should be received with caution and scrutinized with care" (Tr. 114). With all of these factors undercutting Mr. Smith's credibility, the jury must have been impressed with the strength of other aspects of the Government's case.

In sum, testimony about the gun was relevant, probative and not prejudicial; the jury's verdicts were not inconsistent; and, to the extent that the credibility of Mr. Smith was in issue, it worked to appellant's benefit rather than his prejudice. Thus, we submit, the trial judge did not abuse his discretion in admitting evidence about the gun.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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